Li (Migration) [2022] AATA 2933 (12 July 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Weixin Li Ms Huifen Wang Mr Shuailong Li Miss Yuening Li
CASE NUMBER:	1925849
HOME AFFAIRS REFERENCE(S):	BCC2018/1973434
MEMBER:	Peter Emmerton
DATE:	12 July 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decisions not to grant the applicants Employer Nomination (Permanent) visas.

Statement made on 12 July 2022 at 12:45pm

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 Employer Nomination Scheme – Temporary Residence Transition stream – bogus document – false information in the visa application – impostor completed IELTS Test – compassionate or compelling circumstances – impact on the applicant's employer – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cl 186.213, 186.311; Schedule 4, Public Interest Criterion 4020; r 1.03

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 13 September 2019 to refuse to grant the applicants Employer Nomination (Permanent) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).

4. The applicants applied for the visas on 7 May 2018. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 186.213(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because they assessed that there is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application. Therefore PIC 4020(1) is not satisfied and subsequently the requirements of 186.213(1) and as a result 186.213 can-not be satisfied.

5. The applicant appeared before the Tribunal, via video, from Perth, Western Australia, on 12 July 2022 to give evidence and present arguments.

6. The Tribunal hearing was conducted with the assistance of an interpreter proficient in the Mandarin and English languages, at the request of the applicant.

7. The applicant was not represented in relation to the review.

8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.186.213 for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

    - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

    - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

14. The Tribunal notes that the visa applicant provided an IELTS English Language Test Report form dated 8 July 2017 with a test reference number 17AU001256LIW111G with his 186-visa application, which was submitted on 7 May 2018. The Tribunal notes that this form stated he had achieved an overall band Score of 6.5. His Listening score was 6.0 and Reading score of 6.0, Writing 6.5 and Speaking 7.0.

15. The Department referred the Test Results to idp IELTS Australia for verification.

16. The Tribunal notes that on 7 May 2019, idp IELTS Australia responded to the Department's request for confirmation of the visa applicant's results. It is noted that on the testing authority website, Mr Li's result had been set to zero. In their reply, idp IELTS Australia confirmed that the following had occurred.

    'the 08 July 2017 test result for LI, Weixin was cancelled post-release for the use of an imposter. Therefore the scores are shown as zeros on the Online Verification System.' Additionally, the person in the photograph attached to the IELTS test report does not resemble the applicant.'

17. The Department sent Mr Li an 'Adverse Information' letter dated 30 July 2019 which provided him with 28 days to make comment on the suspected 'non-genuine' information provided to the Department.

18. The visa applicant did not respond to the forementioned Natural Justice letter.

19. The visa applicant did not respond to the Department's correspondence within the required time period, nor, subsequently prior to the delegate making their decision post that date. No information was provided to the delegate, refuting the claims of adverse information.

20. When the Tribunal questioned the applicant as to why he had not responded to the 'Adverse Information' letter sent by the Department, he claimed he had not been made aware of it by his agent in China. He only became aware once his visa was refused.

21. **IELTS Test Results**

22. The Tribunal has not been provided with any evidence that Mr Li had challenged the cancellation of his IELTS results with the test organisation.

23. The Tribunal has not been furnished with any credible evidence to refute the assertion that Mr Li or his agent had utilised an imposter to sit the IELTS Test.

24. The Tribunal notes that the applicant requested, was provided with and utilised the services of a Mandarin language interpreter throughout the hearing.

25. The Tribunal notes that it has copies of both the applicant's passport photo and the photo taken of the person who sat the IELTS Test on 8 July 2017. It again notes that the IELTS assessing organisation had determined that it was not he who had sat the test. They had determined that an imposter sat it on his behalf. The Tribunal notes that the Departmental delegate had reached the same conclusion having compared the photograph on the IELTS test and his passport photograph coupled with the fact that the assessing authority had cancelled his test scores. As previously stated, the Department then sought clarification from the testing organisation which confirmed that they had cancelled the test results because they believed an imposter had been used to sit the test on the visa applicant's behalf.

26. The Tribunal has independently examined and compared the photograph on the IELTS test results certificate in conjunction with the passport photograph provided by the visa applicant. It has concluded that there are substantial differences between the facial features displayed in the passport photograph and the IELTS test results certificate photograph taken at the time the English language assessment was purportedly undertaken by the visa applicant.

27. The Tribunal accepts the evidence presented to it that the IELTS testing authority believed his test was sat by an imposter and had subsequently cancelled his test scores. This coincides with the Tribunal's assessment that the photographs indicate the person in the passport photograph and the person in the IELTS test results certificate are not the same person. This has subsequently, lead the Tribunal to the belief that this is the reason or part of the reason to affirm the delegate's decision. The Tribunal has determined that this is relevant because as it has determined that bogus documents had been provided in the visa applicant's application the provisions in PIC 4020(1) were not satisfied. That means that the requirements for his 186-visa could not be satisfied because cl.186.213(1) was not satisfied. His visa therefore subsequently can-not be approved.

28. The Tribunal has formed the opinion that there is evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1).

29. This took the form of an IELTS test results certificate, the results of which were determined to be invalid and subsequently cancelled by the testing authority because they determined that the visa applicant used an imposter to sit the test on his behalf. As previously stated, the Tribunal's assessment that the photographs indicate that the person in the passport photograph and the person in the IELTS test results certificate are not the same person leads it to the conclusion that an imposter was used to sit the IELTS test.

30. Under questioning during the hearing, the applicant stated multiple times that he did not sit the English Test and that he knew nothing about an imposter sitting the test on his behalf. He claimed that the agent had told him he was exempt in relation to the English language requirements. He also stated that he had been 'scammed' by his agent in China who cut off communication once he challenged him because his visa was refused. No evidence was tendered prior to, or at the hearing to substantiate this claim.

31. As it is clearly established by the evidence before the Tribunal and the admissions by the applicant during the hearing, that an imposter sat the test in place of the visa applicant. Therefore, an element of fraud or deception by some person has occurred, as is necessary to enliven the operation of the PIC 4020(1) provision: *Trivedi v MIBP* [2014] FCAFC 42.

32. Subsequently, the applicant does not meet the requirements in PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

33. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

34. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

35. The Tribunal has not been provided with any evidence that there are compelling circumstances that affect the interests of Australia, or any evidence that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.

36. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

37. The Tribunal has not been presented with any evidence that there are any compelling circumstances that affect the interests of Australia. It acknowledges that recruitment of another Chef will create some challenges for the visa applicant's employer in the current low unemployment environment. This is an extremely regular occurrence across a very large number of businesses throughout Australia as staff regularly leave their employers for a diverse variety of reasons. It is reasonably expected by the Tribunal that an employer will have strategies and actions to ameliorate the effects of staff transitions to other employers as a standard business practice. This circumstance does not meet the threshold needed to be compelling or compassionate.

38. The Tribunal does not excuse the fraudulent activity undertaken on behalf of the visa applicant. The Tribunal takes the matter of false or misleading statements or the provision of false physical evidence or information given during a visa application process very seriously. These documents, associated information gathering, and verification procedures provide one of the key pillars to our border security and as such the Tribunal views the legal

responsibilities associated with them as sacrosanct. This perspective was relayed to the applicant during the hearing.

39. The Tribunal has not been presented with any evidence that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa.

40. When asked to comment and respond during the hearing the applicant stated that he wants another chance to stay in Australia, that that he and his wife and children have lived here a long time, are accustomed to life here and paid taxes. He appreciates that Australia is a safe and fair country in which he and his family want to live.

41. The Tribunal acknowledges that this is unlikely to be the visa applicant's preferred outcome and it accepts that there will be dislocation of relationships, work links and friendships as a result of the applicants being required to leave Australia. However, the Tribunal has not been presented with any of the evidence needed to satisfy the concepts of compassionate of compelling circumstances.

42. Therefore, the requirements of PIC 4020(1) should not be waived.

43. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.186.213.

Assessment against other streams

44. In accordance with the Migration Regulations, the Tribunal assessed whether the criteria for the grant of a Regional Employer Nomination visa within any other stream within this visa subclass have been satisfied.

45. The applicant has only sought to satisfy the criteria for a subclass 186 visa in the Temporary Residence Transition Scheme. No claims have been made in respect of the other visa streams. As the requirements that must be met by a person seeking the visa in the other streams have not been met, the decision under review must be affirmed.

46. **Secondary applicants**

- Ms Huifen Wang
- Mr Shuailong Li
- Miss Yuening Li

47. The Tribunal has determined that the secondary applicants listed above are not members of a family unit of a primary applicant who holds a Subclass 186 visa granted on the basis of having satisfied the primary criteria for a Subclass 186 visa.

48. The secondary applicants therefore do not meet cl.186.311.

49. The secondary applicants have only sought to satisfy the criteria for a Subclass 186 visa in the Temporary Residence Transition stream. No claims have been made in respect of the other visa streams. As the requirements that must be met by a person seeking the visa in the Temporary Residence Transition stream, as a secondary applicant have not been met, the decision under review must be affirmed.

DECISION

50. The Tribunal affirms the decisions not to grant the applicants Employer Nomination (Permanent) visas.

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Peter Emmerton
Member

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ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
(a) the application for the visa; or
(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:
(a) starting 3 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:
(a) starting 10 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
(a) compelling circumstances that affect the interests of Australia; or
(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
justify the granting of the visa.

(5) In this clause:
information that is ***false or misleading in a material particular*** means information that is:
(a) false or misleading at the time it is given; and
(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…